Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

FRANK ANTICO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. DOES CONVICTION OF A NON-FEDERAL PUBLIC OFFICIAL FOR EXTORTION UNDER COLOR OF OFFICIAL RIGHT REQUIRE THE GOVERNMENT TO PROVE INDUCEMENT BY THE PUBLIC OFFICIAL RECEIVING BENEFIT UNDER COLOR OF OFFICE, OR AT A MINIMUM A SHARED UNDERSTANDING OF *QUID PRO QUO* BETWEEN THE PUBLIC OFFICIAL RECEIVING BENEFIT AND THE PAYOR OF BENEFIT?

2. DOES CONVICTION OF A PUBLIC OFFICIAL FOR MAIL/WIRE FRAUD IN DEPRIVING CITIZENS OF THEIR INTANGIBLE RIGHT TO HONEST SERVICES BY FAILING TO DISCLOSE A FINANCIAL INTEREST IN THE BUSINESS OF SOMEONE WHO PERFORMS FUNCTIONS BEFORE THE PUBLIC OFFICIAL REQUIRE AS A CONDITION PRECEDENT OF MATERIALITY THAT THE PUBLIC OFFICIAL DO MORE THAN SIMPLY FAIL TO DISCLOSE ANY CONFLICT OF INTEREST?

3. IS IT INAPPROPRIATE TO SENTENCE A PUBLIC OFFICIAL CONVICTED OF MAIL/WIRE FRAUD FOR DEPRIVING CITIZENS OF THEIR INTANGIBLE RIGHT TO HIS HONEST SERVICES BY FAILING TO DISCLOSE A FINANCIAL INTEREST IN THE BUSINESS OF AN INDIVIDUAL WHO PERFORMS FUNCTIONS BEFORE THE AGENCY FOR WHOM THE PUBLIC OFFICIAL WORKS BY REFERENCE TO THAT INDIVIDUAL'S GAIN FROM SERVICES PROVIDED WHEN THOSE SERVICES WERE LEGITIMATE, APPROPRIATE AND USEFUL?

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Appendix B — Order Of The United States Court Of Appeals For The Third Circuit Denying Petition For Rehearing Dated January 12, 2002 ..... 59a

Petitioner, Frank Antico, respectfully requests a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit which was entered in this case on November 28, 2001 with rehearing being denied on January 17, 2002.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is reported at *United States v. Antico*, 275 F.3d 245 (3d Cir. 2001) and is found in the Appendix (App. A). The judgment of the United States Court of Appeals for the Third Circuit entered on November 28, 2001 is found in the Appendix. (App. A). The Order of the United States Court of Appeals for the Third Circuit denying rehearing dated January 17, 2002 is found in the Appendix. (App. B).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

This case originally commenced by indictment in the United States District Court for the Eastern District of Pennsylvania. On May 11, 1999, after a jury trial, Petitioner was convicted. On or about April 28, 2000, the district court sentenced Petitioner to 63 months imprisonment. Petitioner sought review of his conviction and sentence before the United States Court of Appeals. By Opinion dated November 28, 2001, the Court of Appeals affirmed Petitioner's conviction but remanded the case for resentencing. (App. A). It is from that judgment that Petitioner requested a writ of certiorari be issued. On April 8, 2002 Justice Suter granted an extension of time to file this petition to June 1, 2002.

STATUTORY PROVISIONS INVOLVED

In relevant part, the United States Code provides:

> Whoever, in any way or degree, obstructs, delays, or affects commerce or the movement of any article or commodity in commerce by . . . extortion or attempts or conspires to do so . . . shall be fined under

> this title or imprisoned not more than 20 years or both.

18 U.S.C. § 1951(a).

> The term extortion means the obtaining of property from another, with his consent . . . under color of official right.

18 U.S.C. § 1951(b)(2).

> Whoever, having devised or intending to devise a scheme or artifice to defraud . . . for the purpose of executing such scheme or artifice or attempting to do so . . . [uses the mails] . . . shall be fined under this title or imprisoned not more than five years or both.

18 U.S.C. § 1341.

> Whoever, having devised or intending to devise any scheme or artifice to defraud . . . transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing the scheme or artifice, shall be fined under this title or imprisoned not more than five years or both.

18 U.S.C. § 1343.

> For the purpose of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible rights of honest services.

18 U.S.C. § 1346.

In relevant part, the United States Sentencing Guidelines provide as follows:

> If the loss to the government, or the value of anything obtained by a public official or others acting with a public official, whichever is greater, exceeded $2000,

> increase [offense level] by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit).

U.S.S.G. § 2C1.7(b)(1)(A).

STATEMENT OF THE CASE

A. Proceedings and Disposition in the Courts Below

On September 30, 1998, a federal grand jury sitting in the Eastern District of Pennsylvania returned a nineteen count superseding indictment charging Petitioner with racketeering in violation of 18 U.S.C. § 1962(c) (Count 1); Hobbs Act extortion in violation of 18 U.S.C. § 1951 (Counts 2 through 10); wire fraud in violation of 18 U.S.C. § 1343 (Counts 11 through 18); and criminal forfeiture pursuant to 18 U.S.C. § 1963 (Count 19). At all times relevant to this case, Petitioner was a public official employed in various capacities at the Philadelphia Department of Licenses & Inspections in Philadelphia, Pennsylvania.

The racketeering violation (Count 1), included as racketeering acts a series of extortions (some, but not all of which were charged as substantive counts Counts 2 through 10) as well as a series of mail and wire fraud violations (some, but not all of which were also charged as substantive counts Counts 11 through 16).[1] The extortion charges (both racketeering acts and substantive counts) were charged under the theory of extortion under color of right. The mail and wire fraud racketeering acts and substantive counts (excluding Counts 17 and 18)[2] where charged under the theory that Petitioner deprived the citizens of Philadelphia of their rights to his honest services.

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1. Count 1 alleged several extortion and fraud (mail and wire) racketeering acts in addition to those charged as substantive counts. Acts alleged in Count 1 as racketeering acts but not as separate substantive counts occurred beyond the applicable statute of limitations and hence could not be charged separately.

2. Counts 17 and 18 charged wire fraud violations, which took place after Petitioner retired from the City of Philadelphia. These were not charged as racketeering acts in Count 1. Ultimately, the Third Circuit reversed Petitioner's conviction on Counts 17 and 18.

Following disposition of pretrial motions, Petitioner stood trial before a jury sitting in the United States District Court for the Eastern District of Pennsylvania. On May 11, 1999, the petit jury convicted Petitioner of all charges laid in the indictment.[3]

On April 28, 2000, the district court sentenced Petitioner to 63 months in prison on Counts 1 through 10 (racketeering and extortion), such terms to run concurrently. In addition, the district court imposed terms of 60 months of imprisonment on Counts 11 through 18 (wire fraud), such terms to run concurrently with each other and with the sentence imposed on Counts 1 through 10. Finally, the district court imposed a three year supervised release term and a fine of $10,000 and statutory special assessments.

Thereafter, Petitioner sought review of his conviction and sentence in the United States Court of Appeals for the Third Circuit. On or about November 28, 2001, the Third Circuit Court of Appeals issued its Judgment and Opinion affirming Petitioner's conviction on Counts 1 through 16; reversing his conviction on Counts 17 and 18 and directing that Petitioner be resentenced on all counts. The Third Circuit's Opinion and Judgment are attached. (App. A).

Petitioner timely filed a petition for rehearing with the Third Circuit Court of Appeals. On January 17, 2002, the Third Circuit Court of Appeals denied Petitioner's request for rehearing. (App. B).

Petitioner then filed an application under Supreme Court Rule 13(5) requesting an extension of the time in which to petition this Court for a writ of certiorari, which was extended to June 1, 2002. Since June 1, 2002 is a Saturday, the actual filing deadline is June 3, 2002. *See* Supreme Court Rule 30(1).

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3. The jury did find one racketeering act – one not charged as a substantive count – unproven.

B. Statement of the Facts

1. Extortion Racketeering Acts/Substantive Counts (Question 1)[4]

At all times relevant to this case, Petitioner was employed in various positions in the Department of Licenses & Inspections ("L & I") of the City of Philadelphia. L & I's function is to administer and enforce Philadelphia's code requirements including building, electrical, fire, business and zoning regulations. In large part, Petitioner was responsible for enforcement of L & I's rules and regulations directed to Philadelphia businesses, including bars and cabarets.

The gravamen of respondent's extortion claims/proofs was that Petitioner abused his public office through engaging in Hobbs Act extortion on multiple occasions by either receiving things of value for himself or for others under color of his office. Respondent's evidence tracked incidents and episodes that made up part of the charged pattern of racketeering activity.

In every instance of alleged Hobbs Act extortion, Respondent claimed and ostensibly proved that Petitioner either received something or attempted to receive something for himself or for some other person. In some instances, the payor or provider of benefit received something in exchange for the payment. In others, the payments were made purely because of Petitioner's position with L & I. In no instance of extortion, however, did Respondent prove (or even allege) that Petitioner induced the payor to make any payment or provide any benefit to Petitioner. Two examples of Respondent's proofs highlight this distinction.[5]

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4. A detailed statement of the facts underlying all the extortion charges is contained in the Third Circuit's Opinion. (App. A at 4a-12a).

5. As stated above, the evidence involved a series of at least 16 extortions. The facts concerning all the extortion charges/racketeering acts are set forth in the Court of Appeals Opinion. *See* note 4, *supra*.

Barbara Williams Episode – Racketeering Act 16[6]

Barbara Williams worked as an expediter, *i.e.*, a private entrepreneur, who, for a fee, would assist people with matters pending before L & I. On numerous occasions between 1985 and 1989, Ms. Williams paid Petitioner amounts totaling approximately $5,000 because of his position in the zoning unit at L & I. Sometimes she needed permit applications processed immediately by L & I. At the time, L & I operated on a first come, first served basis in processing applications for zoning or use registration permits. Ms. Williams was able to circumvent this policy by paying Petitioner. In this instance, the indictment seems to allege, and Respondent seems to have proven *quid pro quo*, but certainly not inducement.

Teazers Episode – Racketeering Act 12/Count 9

Thomas Kileen was the owner of Teazers, an adult club located in Philadelphia. On September 23, 1993, Petitioner and other L & I officials closed Teazers down because the dancers were in violation of local law and restrictions. After Teazers reopened, Kileen noticed Petitioner in the club on a number of occasions. He spoke with Petitioner and began to socialize with him. Kileen began to give Petitioner free drinks. In addition, Kileen gave Petitioner baseball tickets and on one occasion, the use of a limousine. Respondent presented no evidence to suggest that Petitioner did anything for Kileen in exchange for the receipt of these benefits. Kileen gave Petitioner free drinks and Phillies tickets and allowed him the use of the limousine solely because of his position. In this instance, clearly, Petitioner did not perform anything in exchange for the benefit received – hence, no *quid pro quo*. Again, no inducement was proven.

When the case was submitted to the jury, the district court did not instruct the jury that it was required to determine whether Petitioner induced his extortion victims into giving him gifts

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6. Petitioner was charged with only nine substantive extortion counts (Counts 2 through 10). As part of the racketeering charge, however, the government alleged 16 separate racketeering acts. *See* note 1, and accompanying text *supra*.

and favors with a promise or threat of an official act in return, or at a minimum that a *quid pro quo* was required to be understood between Petitioner and the payor. The Third Circuit Court of Appeals found the district court's refusal in this regard to be appropriate. *See* App. A at 18a-30a.

2. Mail and Wire Fraud Racketeering Acts and Counts (Question 2)[7]

During his employment with L & I, Petitioner became romantically involved with Elizabeth Ricciardi. In the 1980's, Ricciardi had two children by Petitioner. Initially, Petitioner failed to make child support payments forcing Ricciardi to file a child support petition in the Philadelphia Court System. Petitioner then volunteered to pay child support if Ricciardi withdrew the petition. At some point thereafter, in lieu of future child support payments, Petitioner offered to assist Ricciardi in setting up an expediting business. Petitioner assisted Ricciardi by helping her complete forms and teaching her what she needed to know in order to become an efficient expediter.

Petitioner and Ricciardi understood that in exchange for Petitioner's assistance in her expediting business, Ricciardi would forgive Petitioner's then existing and future child support obligation.[8] Thereafter, Ricciardi began and pursued a fairly lucrative career as an expediter. In fact, over an approximate seven year period ending in 1995, Ricciardi earned gross receipts from her expediting business in excess of $700,000.

Although everyone with whom Petitioner worked, including his supervisors, knew of his personal relationship with Ricciardi, Petitioner was charged with and convicted of mail and wire fraud on the theory that he had an undisclosed financial relationship with Ricciardi and therefore (through non-

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7. A detailed statement of the fact underlying the mail and wire fraud charges is set forth in the Court of Appeals Opinion. App. A at 13a -15a.

8. The record established the value of forgiven child support to be approximately $32,000. App. A at 37a.

disclosure) deprived the citizens of Philadelphia of their intangible right to his honest services.[9]

In connection with this aspect of the case (mail and wire fraud relating to Ricciardi), Petitioner argued both insufficiency of evidence and improper jury instruction on the materiality element of the offense(s). Specifically, Petitioner argued that his undisclosed financial interest in Ricciardi's expediting business terminated once she earned more than the forgiven child support debt ($32,000). Since under the evidence, Ricciardi earned this amount of money very early in her expediting career, any disclosure failure by Petitioner was not material to the fraud charges laid in the indictment and submitted to the jury.

3. Sentencing Related Facts (Question 3)[10]

The district court sentenced Petitioner to 63 months on the RICO count (Count 1) and the extortion counts (Counts 2-10). In addition, the district court imposed a 60 month sentence on the fraud related counts (Count 11-18).

In calculating the sentencing guidelines on the fraud counts, the district court applied U.S.S.G. § 2C1.7 as the section most appropriate for fraud cases involving the deprivation of faithful and loyal services. In applying U.S.S.G. § 2C1.7, the district court enhanced the guidelines by reference to the in excess of $7000,000 gross receipts earned by Ms. Ricciardi. Petitioner argued that the proper measure of loss for purposes of U.S.S.G. § 2C1.7 was the $32,000 child support obligation which Ricciardi forgave in exchange for Petitioner's assistance in setting up the expediting business. The Third Circuit Court of Appeals affirmed the district court's conclusion on this point. *See* discussion at App. A at 30a-44a.

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9. Noteworthy is the absence of allegations or proof that Petitioner ever approved any application or permit request for Ricciardi (or her clients) that should not have been approved.

10. A detailed discussion of the facts relevant to this issue is set forth in the Court of Appeals Opinion. (App. A at 13a-15a).

REASONS FOR GRANTING THE WRIT

A. The court below – in conflict with other judicial circuits and at least three members of this Court – incorrectly held that prosecution of a non-federal public official for color of office extortion does not require the government to prove inducement by the public official receiving benefit under color of office, or at a minimum, a shared understanding of *quid pro quo* between the public official receiving benefit and the payor of benefit.

Below, Petitioner argued that color of office extortion requires the government to prove inducement by a public official receiving benefit under color of office, or at the very least an understanding of *quid pro quo* between the public official receiving benefit and the payor of benefit.[11] The district court refused to instruct the jury on these points.

In Petitioner's view, the conviction for color of office Hobbs Act Extortion requires both proof of inducement and *quid pro quo*. Judicial authority on this point can be traced to this Court's opinions in *McCormick v. United States*, 500 U.S. 257, 111 S. Ct. 1807, 114 L. Ed. 2d 307 (1991) and *Evans v. United States*, 504 U.S. 255, 112 S. Ct. 1881, 119 L. Ed. 2d 57 (1992).

In *McCormick*, this Court concluded that proof of specific *quid pro quo* is a necessary element of color of office extortion, at least when the prosecution is based exclusively on payments identified as campaign contributions. Noting the special place of campaign contributions in our system of government, Justice White pointed out that cases of fear, intimidation and violence were still covered by the Hobbs Act as were color of office campaign contributions but only if:

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11. Petitioner does not argue that color of office extortion under 18 U.S.C. § 1951 requires a specific agreement such as: in exchange for a payment, a public official agrees to do a very specific thing. Petitioner argues only that there must be some understanding between the payor and the public official that the payment is made in exchange for some action or inaction at some point. The key, however, is the existence of an understanding of *quid pro quo*.

> [T]he payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking.

Id. 500 U.S. at 273, 111 S. Ct. at 1816.

One year later, this Court decided *Evans*. The point came up again, but in a campaign and non-campaign setting. *Evans* involved the case of a local official who took, in an FBI sting dealing with re-zoning a particular tract, the sum of $7,000 in currency and $1,000 by check payable to an election campaign fund. The check was reported by the recipient, the currency was not. The official claimed he had not promised to do anything in return for cash. The trial court, however, instructed that passive receipt was enough if the official knows his office was the motivating factor and the payment is for a specific requested exercise of official power. The trial court in *Evans* instructed the jury as follows:

> [I]f a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, and a demand or acceptance does constitute [color of office extortion].

United States v. Evans, 504 U.S. at 258, 112 S. Ct. at 1884.

Justice Stevens, writing for the court, found that the above instruction satisfied the *McCormick* requirement of *quid pro quo*, apparently referring to the campaign contribution check, "because the offense is completed when the public official receives a payment in return for his agreement to perform specific official acts; fulfillment of the *quid pro quo* is not an element of the offense". *Id.*, 504 U.S. at 268, 112 S. Ct. at 1889.

Speaking more broadly, Justice Stevens then said:

> We hold today that the Government need only show that a public official has obtained a payment to which

> he was not entitled, knowing that the payment was made in return for official acts.

Id. 504 U.S. at 268, 112 S. Ct. at 1889. (Emphasis added.)

Justice Kennedy concurring, and referring to the above language in particular, stated the language was critical to Hobbs Act jurisprudence and conclude the dissent was likewise of the view that *quid pro quo* is an element in all Hobbs Act color of right cases. Justice Kennedy stated: -

> Readers of today's opinion should have little difficulty in understanding that the rationale underlying the Court's holding applies not only in campaign contribution cases, but all section 1951. That is as it should be, for, given a corrupt motive, the *quid pro quo,* as I have said, is the essence of the offense.

Id. 504 U.S. at 278, 112 S. Ct. at 1894.

This Court's dissenters (the Chief Justice and Justices Thomas and Scalia) believe that without "inducement" there can be no extortion.[12] They appear to have accepted *quid pro quo* as an element although a "made up" one, designed to avoid the more rigorous inducement requirement. *Id.* 504 U.S. at 285, 112 S. Ct. at 1898.

In light of the above, it is clear that a significant number of the current members of this Court are of the view that *some form of quid pro quo* is needed and the minimum formulation is that there be an understanding that the payment is "in return for official acts". Additionally, at least three and possible four members of this Court would require inducement.

Examination of the charge in the present case clearly establishes that the trial court did not comply with this Court's minimal formulation of *Evans' quid pro quo* thereby necessitating a new trial without much further discussion. As is

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12. Additionally, given that Justice O'Connor specifically refused to consider whether the statute requires inducement by the public official, *Id.* 504 U.S. at 271, 112 S. Ct. at 1891, it is possible that at least four members of this Court believe inducement to be required.

set forth in the Third Circuit's Opinion (*see* App. A at 26a-27a), in this case, the district court charged the jury as follows:

> Extortion under color of official right is the use of one's position as a public official or the authority of public office to obtain money or services not due the official or his public office. Such extortion violates the Hobbs Act . . . If you decide that the defendant was given money or goods or services not due the office he represents then you must decide whether the defendant used the authority of his office or position to obtain the money, goods or services. The third element is wrongful obtained consent of the giver. The government must prove beyond a reasonable doubt that these items were given to the defendant in connection with his power and authority as a public official. The giver may have initiated the exchange and the parties may be on friendly terms. These are factors to be considered in deciding whether the giver gave the payments, goods or services because he believed the defendant would use his office of acts not properly related to his official duty or whether instead the giver was making a voluntary contribution.
>
> Unless you believe beyond a reasonable doubt that the defendant knew the giver's consent was wrongfully obtained, that is, that the money, goods or services were given in connection with the defendant's misuse of his official position rather than being given voluntary you cannot convict the defendant.

As the Court of Appeals noted, no specific instruction to find an express *quid pro quo* was given. In fact, the words *quid pro quo* are nowhere mentioned. Nor did the district court specifically negate such a requirement as did the trial court in *McCormick*. The instruction given by the district court in this case is a completely watered down and misleading version of *quid pro quo* required under the *McCormick-Evans* line of cases.

Ironically, the Third Circuit court of Appeals itself seems to require a greater showing of *quid pro quo* requirement than that presented and approved in this case. In *United States v. Bradley*, 173 F.3d 225 (3d Cir. 1991) the court held in a non-campaign case that an "express agreement" need not be proved [Petitioner makes no such claim in his *Evans* claim] but there must nonetheless be a *quid pro quo*. The court stated the following:

> [Extortion under color right] is completed at the time when the public official knowingly *accepts the benefit in return for his agreement to perform or not perform an act related to his office.*

173 F.3d at 23. (Emphasis added). This statement of the law cannot be reconciled with the Court of Appeals decision in this case.

Additionally, the decision below starkly conflicts with statements of the law on this point articulated by other circuits. For example, in a case decided after the instant case was submitted to the Third Circuit, the Seventh Circuit Court of Appeals held that:

> *Evans*, which although not entirely clear, can easily be read to lend support to an inference that the *quid pro quo* requirement applies in all extortion prosecutions under the Hobbs Act . . . We therefore join the circuits that require a *quid pro quo* showing in all cases.

United States v. Giles, 246 F.3d 966, 972 (7th Cir. 2000). In reaching this conclusion, the Seventh Circuit noted that the requirements for conviction under 18 U.S.C. § 1951 in a non-campaign color of right case is somewhat confusing, especially given the different views espoused by members of this Court – including the strong view expressed by the dissent that *quid pro quo* in fact equals inducement.

As stated above, this Court should grant Petitioner's writ of certiorari simply because the circuit courts are in conflict on this issue. *See* Supreme Court Rule 10. Clearly, the Third

Circuit's opinion in the instant case cannot be reconciled with *Giles*. Additionally, the Second Circuit Court of Appeals in *United States v. Middlemiss*, 217 F.3d 112 (2d Cir. 2000) seems to apply another "watered down" *quid pro quo* requirement. That court in *United States v. Middlemiss*, 217 F.3d 112 (2d Cir. 2000) requires some proof of *quid pro quo*, although a somewhat watered down version. Specifically, in *Middlemiss*, the Second Circuit articulated the standard as follows:

> The government need only show that a public official has obtained a payment to which he was not entitled, *knowing that the payment was made in return for official acts and proof of an explicit promise to perform the official acts in return for the payment is not required.*

Id. 217 at 117 (emphasis added) (citations omitted).

Clearly, the Seventh Circuit in *United States v. Giles*, 246 F.3d 966 (7th Cir. 2000), as well as the Ninth Circuit, *see United States v. Tucker*, 133 F.3d 1208, 1215 (9th Cir. 1998) require a specific understanding of *quid pro quo* in exchange for benefit. The Second Circuit requires just some understanding that the payment was made in return for official acts. The Third Circuit's view as articulated in the present case (as opposed to its prior decision in *Bradley*) requires no understanding that payment being made is for some official act. Certainly, the Third Circuit does not require a specific *quid pro quo* as does the Seventh Circuit and as is required under this Court's *McCormick* and *Evans* cases.

For these reasons alone, the writ of certiorari should issue. Nonetheless, there are also other reasons for this Court to issue the writ of certiorari. For example, the line of cases discussed above must now be examined in light of this Court's decision in *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 119 S. Ct. 1402 (1999).

Shortly before this case was submitted to the jury, this Court decided *Sun-Diamond Growers*. That case arose under the federal anti-gratuity statute, 18 U.S.C. § 201, and in a startling

way rejected years of consistent circuit court precedent. In *Sun-Diamond Growers*, this Court held that for a federal official to violate § 201 more was needed than a general understanding that the payment was given in connection with the office, or for general good will. Instead, there had to be a specific tie in between the payment and some specific official act.

In this case, both before the district court and the court of appeals, Petitioner argued that this Court's holding in *Sun-Diamond Growers* is illustrative of how courts must interpret 18 U.S.C. § 1951 color of right cases – especially when the evidence suggests nothing more than payment of a gratuity to a local official. The courts below dismissed this argument suggesting that *Sun-Diamond Growers* is nothing more than a statutory interpretation case. The lower courts' attempts to relegate *Sun-Diamond Growers* to a mere statutory interpretation case miss the forest for the trees in several respects.

First, the statutory formulation in 18 U.S.C. § 201(c)(1)(A), the gratuity statute, prohibits the giving of anything of value "for or because of any official act", language that for many years had been read by the circuits as not requiring a *quid pro quo*. This language is virtually identical to Justice Stevens' formulation of Hobbs Act extortion in color of official right cases in *Evans*. It seems highly unlikely this Court would give separate meanings to virtually identical formulations, even if one is statutory and the other case law. In truth, this Court's opinion in *Sun-Diamond Growers* sounds the death knell for any sort of stingy *quid pro quo* instructions in Hobbs Act cases since it makes no sense to bless different interpretations of virtually identical sets of words where those words described prohibited activity for similarly situated potential defendants – public officials.

Second, principles of federalism balk at the idea that local public officials can be prosecuted under the Hobbs Act on a less stringent standard than applicable to their federal counterparts. In his dissent in *Evans*, Justice Thomas states:

> The Court's construction of the Hobbs Act is repugnant not only to the basic tenets of criminal justice reflected in the rule of lenity, but also to basic tenets of federalism. Over the past 20 years, the Hobbs Act has served as the engine for a stunning expansion of federal criminal jurisdiction into a field traditionally policed by state and local laws — acts of public corruption by state and local officials . . . [Mr. Justice Thomas discusses *United States v. Kenny*, 462 F.2d 1205, *progenitor* of the Hobbs Act "stunning expansion"] . . *Kenny* obliterated the distinction between extortion and bribery, essentially creating a new crime encompassing both.
>
> > "As effectively as if there were federal common law crimes, the court in *Kenny* . . . amend[ed] the Hobbs Act and [brought] into existence a new crime — local bribery affecting interstate commerce. Hereafter, for purposes of Hobbs Act prosecutions, such bribery was to be called extortion. The federal policing of state corruption had begun." J. Noonan, Bribes 586 (1984).
>
> After *Kenny*, federal prosecutors came to view the Hobbs Act as a license for ferreting out all wrongdoing at the state and local level — "a special code of integrity for public officials." . . . In short order, most other circuits followed *Kenny's* lead and upheld, based on a bribery rationale, the Hobbs Act extortion convictions of an astonishing variety of state and local officials, from a state governor down to a local policeman.

Evans v. United States, 504 U.S. at 290-292, 112 S. Ct. at 1901.

At the heart of the "new crime" under the Hobbs Act was receipt of money that could be a gratuity, in the sense of no *quid pro quo,* or a watered down formulation of that standard. As Justice Thomas suggests, the idea that money was given

"due to the office" was the creation of a new, previously unknown crime. In truth, it was a construct to enable federal prosecution of local corruption and to substantially reduce the quality of proofs needed to convict.

The Hobbs Act formulation as applied by the court below makes bribery the equivalent of extortion in color of office cases and then dilutes bribery into a hybrid crime created and since decided by circuit court precedent, *i.e.*, a peculiar species of bribery where only a diluted *quid pro quo* is needed. This judicially created crime is particularly vulnerable in the post *Sun-Diamond Growers* era for three separate reasons.

First, there exists today a heightened sense of federalism that was not present in the early 1990's when this Court decided *Evans*. Today, federalism discourages expanding by judicial fiat general federal laws into a "stunning" local sweep. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1998). Second, this Court's reasoning in *Sun-Diamond Growers'*, while based on statutory interpretation, effectively eliminates any distinction between gratuity and bribery and thereby undermines the very reasoning of the Hobbs Act cases which have created the hybrid Hobbs "color of office" gratuity crime. Finally, *Sun-Diamond Growers* results in a paradoxically higher standard of conduct for local officials than federal officials than for their federal counterparts. Federal officials are exposed under 18 U.S.C. § 201 to the criminal penalties for gratuity/bribery only when there is a *quid pro quo*; whereas, under the Third Circuit's formulation of Hobbs Act extortion, a local official may be exposed to the very severe penalties of the Hobbs Act in a mere color of office gratuity case without a finding of *quid pro quo,* as was Petitioner.

This approach is facially unlikely to withstand the scrutiny flowing from this Court's sensitivity to federalism concerns after *United States v. Lopez, supra.* and recent federalism cases collected at *United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (U.S. Va. 2000). This is especially true when the judicially created definition of color of office extortion

is remarkably close to the statutory words interpreted by this Court in *Sun-Diamond Growers*.

For all of these reasons, the writ of certiorari should issue.

B. Petitioner did not deprive Philadelphians of his "honest services" by virtue of the activity pled and proven in the Ricciardi counts. Regardless, a new trial must be granted due to the insufficiency of materiality jury instructions.

The court below concluded that Petitioner violated the mail and wire fraud statutes because he had a financial interest in his girlfriend's expediting business of a type that violated city and state conflict of interest laws. By non-disclosure of this "financial interest" in Ricciardi's business, Petitioner somehow schemed to deprive the citizens of Philadelphia of their intangible right to his honest services. The court of appeals found that Petitioner engaged in acts of dishonesty such as failing to disqualify himself in matters of Ricciardi's expediting business as well as using his office for private pecuniary benefit to himself. Nonetheless, it was critical to the court's conclusion that at the time of mailings/wires, Petitioner had a "financial interest" in Ricciardi's business. *See* App. A at 39a-40a.

Petitioner's conviction was premised on a subtle and complex theory of indirect financial gain to Petitioner. However, Petitioner received no gain from Ricciardi's business. It was undisputed that Petitioner received no share of the proceeds. It was Ricciardi who received gain. Ricciardi's gain was claimed to be in lieu of or as a substitute for court-ordered *child support payments to his children.* On the theory as advanced and proven, Petitioner was the beneficiary of the arrangement because Ricciardi forgave a debt he owed – court ordered support to his children. Hence, Petitioner had a unique "financial interest" in Ricciardi's expediting business.

Facially, this theory appears absurd. The forgiven child support was in the amount of $60 per week and totaled approximately $32,000. Ricciardi worked in her expediting business for over ten years and by any stretch of the imagination,

generated receipts which dwarfed Petitioner's forgiven child support. Over a seven year period ending in 1995, Ricciardi earned gross receipts from her business in excess of $700,000. Petitioner's "financial interest" and "private pecuniary benefit", which allegedly created the conflict of interest under local and state law, were premised, according to the indictment and proofs, on the theory that the money Ricciardi would and did earn was in lieu of child support payments to her for their two children.

Obviously, there was a significant surplus of gain to Ricciardi after consideration of the forgiven child support. What happened to this surplus? The court below never answered this point, nor could it because it is self-evident that the dominant character of the arrangement had nothing to do with the modest court ordered support payments. The understanding was one of nepotistic gifting to a girl friend, plain and simple, not "discharge of debt", the stilted and inapposite theory advance by the government. Gifting girlfriends violated neither the local ethics rules nor federal law, notwithstanding the conclusions of the court below, at least not based on the theory advanced in this case.

The court below stated the government's prosecution theory to be as follows:

> The government's prosecutorial theory on this point [was] that [Petitioner] by failing to disclose his personal interest in a matter over which he had discretionary – decision making authority, deprived the public of its right to disinterested decision-making and of its right to full disclosure of his potential motivation. The scheme to defraud involved [Petitioner's's] setting up Ricciardi as an expediter, then preparing and approving her permits. Ricciardi received a fee for her "services" which in turn substituted for Petitioner's obligation to pay child support.
>
> The government [contended] that the requisite intent to defraud was met, in light of this scheme, by

> [Petitioner's] failure to disclose the nature of his personal interest in Ricciardi's business and to recuse himself from reviewing approvals submitted by her. Finally, the government contends, and [Petitioner] does not dispute on appeal that interstate phone calls and mailings were made in furtherance of the scheme.

App. A at 34a-35a. In this light, Petitioner's "interest" in Ricciardi's business flowed from the forgiven child support obligation, an amount which by all accounts Ricciardi would have earned long before the interstate phone calls or mailings at issue. Therefore, Petitioner's failure to formally disclose at the time of mailings and interstate telephone calls that which was common knowledge could not be material under this Court's jurisprudence.

In *McNally v. United States,* 483 U.S. 350, 107 S. Ct. 2875 (1987) this Court ruled that the federal mail and wire fraud statutes did not prohibit a scheme to defraud the public of intangible rights such as honest services of public officials. Congress responded with 18 U.S.C. § 1346, effective November 11, 1988, restoring pre-*McNally* law that such schemes were prosecutable under the fraud statutes, prospectively. The statute had no retroactive effect. *United States v. Grandmaison*, 77 F. 3d 555, 565-68 (1st Cir. 1996).

The body of law that has developed since suggests that the type of criminal behavior covered by the "deprivation of honest services" theory "eludes easy definition" but is generally directed at public officials who engage in "serious corruption, such as embezzlement of public funds, bribery of public officials or the failure of public decision-makers to disclose certain conflicts of interest". *United States v. Czubinski,* 106 F.3d 1069, 1076 (1st Cir. 1997), citing *United States v. Sawyer,* 85 F.3d 713, 723 (1st Cir. 1996). The *Czubinski-Sawyer* line of cases emphasize that the "broad scope" of the intangible rights theory does "not encompass every instance of official misconduct that results in the official's personal gain".

> *Sawyer* holds that the government must not merely indicate wrongdoing by a public officials but must also demonstrate that the wrongdoing at issue is intended to prevent or calling into question the proper or impartial performance of that public servant's official duties . . . [pre-McNally precedent demonstrates] that even where public officials violated state laws their actions were not found to defraud citizens of their right to honest services, because the officials did not actually fail to perform their official duties properly . . . In other words, "although a public official might engage in reprehensible misconduct related to an official position, the conviction of that official cannot stand where the conduct does not actually deprive the public of its right to her honest services and it is not shown to intend that result".

Czubinski, 106 F.3d at 1077.

Violations of public official workplace rules, even ethical standards, will not alone support a prosecution under this theory. This includes violation of IRS internal ethical rules by IRS employees. In *Czubinski* no violation was found on seemingly aggravated facts where an IRS employee, a KKK member, pulled IRS confidential tax information from computer data banks to develop dossiers on enemies and friends including an assistant district attorney and a political opponent, all of which was in violation of IRS internal ethical standards and rules. Defendant directly breached an IRS Rule of Conduct, an implementation of Congressionally required confidentiality for tax return information. Yet this was not a violation cognizable under 18 U.S.C. § 1346. *Id.*

In *Sawyer* a lobbyist's conferral of something of value in violation of a state gift statute was found insufficient, in itself, to establish a scheme to defraud the public of the intangible right to honest services. Lastly, in *United States v. Goldberg*, 928 F. Supp. 89 (D. Mass. 1996) the defendant attempted to

influence public officials concerning an eminent domain issue with which he was concerned by providing things of value, *i.e.*, free vacations at a summer home he had rented for the public official on Cape Cod. His pretrial attack on his indictment was unsuccessful but the district court aptly summarized the state of the law on intangible rights prosecutions of this sort as follows:

> . . . what the *Sawyer* opinion makes clear is that mere violation of state ethics law, standing alone, does not suffice to establish the intent to deprive the citizenry of the "honest services" of a government official and is therefore insufficient to establish a violation of the mail fraud statute. Something other than a state ethics law violation . . . [citing illustrations of proof of fraudulent intent or contemplation of actual harm or injury] . . . is necessary to support a mail fraud conviction under section 1346.

United States v. Goldberg, 928 F. Supp. at 89.

In the present case, Petitioner's purported child support obligation, assuming such was the motivation for setting up Ricciardi in business and helping her, was fully discharged under any stretch of the imagination by November, 1988, the date 18 U.S.C. § 1346 became effective. "Forgiven child support" was very meager compared to Petitioner's gift giving to Ricciardi. It is the nature of the arrangement as of November, 1988, not the arrangement in 1985 (when child support was ordered), that controls. Moreover, of equal importance, the dates chosen for wire fraud prosecution in counts 11-16 were all in December, 1993.[13] Ricciardi had been working as an expediter for *8 years* by the time the interstate telephone calls at issue in the substantive counts took place. Given this, it is an obvious stretch to contend that any wire communications were in furtherance of the scheme as pled. After 8 years Ricciardi was on her own and had received nearly one-half million dollars,

13. *See* App. A at 15a.

a lesser sum by November, 1988 but still considerably more than the child support obligation.

The evidence failed to show that as of late 1993 Petitioner had any financial interest in Ricciardi's expediting business that supported the crime set forth in this indictment. Obviously, a species of nepotism was continuing, but it invoked a loophole, the girlfriend, a circumstance not facially covered by the ethics rules[14] and, in any event, a quagmire Respondent avoided by charging the "discharge of debt" theory. Respondent's prosecutive theory and the reasoning of the court below were not premised on Ricciardi getting money for herself, despite the overwhelming weight of evidence showing that was what actually happened. Instead, discharge of debt was the theory advanced by Respondent and accepted by the Third Circuit. Petitioner's prospective private financial gain, not the children's gain, created the conflict of interest as charged.

No gain to Petitioner existed when 18 U.S.C. § 1346 was enacted, since all the existing and future child support obligations were discharged by enactment date. Therefore, the evidence was wholly insufficient to demonstrate that the wires selected for substantive prosecution, or for that matter the mailings in 1990, were in furtherance of the scheme as pled. Ricciardi was on her own, simply receiving a handsome income through Petitioner's help. With this understood, absent deceit, concealment, demonstrable public harm or other active fraud, nepotism of this sort at issue in this case is a crime.

Additionally, Petitioner is entitled to a new trial because in this pre-*Neder* but post-*Gaudin* case, materiality [in a non-disclosures concealment case] was not put to the jury as an element subject be proof beyond a reasonable doubt, a circumstance that cannot be dismissed as harmless error due to the absence of *mens rea* instructions or other instructions to illuminate for the jury what was material, and what was not material, to the government's case.

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14. Applicable ethics rules are set forth in notes 7 and 8 of the Court of Appeals Opinion. App. A at 13a-14a.

On June 10, 1999 (after trial in this case), this Court decided *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) holding, as here pertinent, that materiality is an element of a scheme or artifice to defraud under the mail/wire fraud statutes. Materiality must be put to the jury per the earlier rule of *United States v. Gaudin*, 515 U.S. 506, 115 S. Ct. 2310 (1995). In Petitioner's view, materiality was not properly put to the jury as required under *Neder*. This issue was reviewed under a plain error standard as no objections were taken.

The jury instructions complained of below were fairly summarized by the Court of Appeals. Specifically, the Court of Appeals stated:

> The government must prove beyond a reasonable doubt that there was a "scheme or artifice to defraud", and define a scheme or artifice to defraud as, any plan, device, or course of action to obtain money or property or the intangible right of services by means of false or fraudulent pretenses, representations or promises reasonable calculated to deceive persons of average prudence. In describing "false and fraudulent representations," the district court stated: "The false or fraudulent representations or failure to disclose must relate to a material fact or matter. A material fact is one which would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision.

App. A at 42a.

As recognized by the court below, the district court did not instruct the jury that materiality when based on failure to disclose (as distinguished from affirmative misrepresentations) had to be proven beyond a reasonable doubt, as required by *Neder*. Additionally, the district court specifically failed to relate such concept to the theory pled in the Ricciardi counts.

Although the court below properly reviewed this issue under a plain error standard, the court did rule on the merits – albeit

incorrectly – and did not hide behind the shield of harmless error analysis. *See* App. A at 41a-44a. With respect to the Ricciardi counts, the instructions gave no temporal or other point of reference to determine Petitioner's criminality. Honest services cases must be based on deceit, concealment or other forms of active fraud. *See United States v. Sawyer*, *supra*. The theory pled and proven in the fraud counts has been discussed above, involving as it does a concept which alleged that Petitioner had a financial interest in Ricciardi's business in violation of the terms of local and state ethics laws. *None of this was even mentioned to the jury.* It cannot be ascertained from the instructions whether the case was put to the jury on the theory Petitioner was alleged to have violated federal law because he failed to disclose the child support arrangement with Ricciardi or because he had assisted her business regardless of disclosure of the arrangement or whether violation of the state and local rules was in itself enough. The local laws themselves were not put before the jury during the instructions. The district court never instructed the jury on the core point, whether Petitioner had a statutorily prohibited financial interest in the expediting business. There simply was no point of reference for the criminality other than Petitioner had to possess an "intent to defraud".

Moreover, no instructions were put to the jury on the key issue of whether as of *December, 1993* (the date of the mailing at issue) Petitioner continued to have the "financial interest" in Ricciardi's expediting business that would have created a conflict of interest violation under Philadelphia/Pennsylvania ethics laws.

Finally, no instruction advised the jury that Petitioner had to know all this to be convicted on these counts – that he had a disclosable interest, that non-disclosure created a conflict, and that all this drove his non-disclosure as of December, 1993. These points all crystalized in the absence of materiality instructions on the nature of this particular prosecution, not mail/wire fraud cases in general.

C. The Case Should be Remanded for Resentencing Because the district court erroneously computed "loss" on the Fraud Counts

In calculating the fraud guidelines, the district court applied U.S.S.G. § 2C1.7. A relevant consideration under that guideline section is the "loss to the government or the value of anything obtained or to be obtained by a public official or those acting with a public official." U.S.S.G. § 2C1.7(b)(1)(A). In considering what loss or gain, if any, to consider under U.S.S.G. § 2C1.1(b)(1)(A), the district court referenced the in excess of $7000,000 of gross receipts earned by Ricciardi in her expediting business. The district court (with the blessing of the Third Circuit) was of the view that for purposes of that guideline section, U.S.S.G. § 2C1.1, the appropriate point of reference for loss/gain calculation is the gain to Ricciardi.

Petitioner unsuccessfully argued that any loss/gain consideration must be made by reference to the approximate $32,000 of forgiven child support. The theory under the fraud counts was that Petitioner breached his duty of faithful and loyal services to the City of Philadelphia by helping Ricciardi establish an expediting business in exchange for his not having to pay child support. In other words, he should have disclosed his financial interest in the Ricciardi business and disqualified himself from connection with the affairs of that business. Therefore, under Petitioner's argument, the maximum gain to Petitioner and the figure which should have been used as a point of reference under U.S.S.G. § 2C1.1(b)(1)(A) was approximately $32,000.

As a general proposition, loss in a fraud case is the amount/value of property taken or the gain received. The application notes to U.S.S.G. § 2F1.1 define "loss" as "the value of property taken, damaged or destroyed". *See* U.S.S.G. § 2B1.1, application note 8. Where determination of loss is difficult, courts look to the gain received by the defendant if it provides a reasonable approximation of the losses at issue. *See United States v. Anderson*, 45 F.3d 217 (7th Cir. 1995); *United States v.*

Galbraith, 20 F.3d 1054 (10th Cir. 1994); *United States v. Haddock*, 12 F.3d 950 (10th Cir. 1993). Here, if gain is used the figure is substantially less than $700,000.

Viewed through the prism of Ricciardi's own actions, there appears to have been zero loss to her clients. No customer was deprived of anything by hiring Liz Ricciardi. In fact, Ricciardi provided services as paid for by the customers. In addition, Ricciardi never paid any portion of her receipts to Petitioner. Also of significance is the fact that notwithstanding Petitioner's conviction, the evidence revealed *de facto* disclosure of Petitioner's relationship with Ricciardi as well as the fact that he was helping her in her expediting business in lieu of his child support payments. The subject was common knowledge around L&I.

The Third Circuit's decision in *United States v. Maurello*, 76 F.3d 1304 (3d Cir. 1996) illustrates the error in calculating loss by reference to Ricciardi's income. *Maurello* involved a case where a disbarred attorney was convicted of mail fraud and credit card fraud. Though Maurello had been disbarred, he continued to practice law and billed clients for legal services. The district court determined the loss to be the total of all the fees Maurello earned from this fraudulent practice of law. The Third Circuit reversed this aspect of the case because the majority of Maurello's clients received what they paid for, i.e., legal services, despite the fact he had inveigled them into obtaining and accepting his services by fraud. Consequently, the court remanded the matter to the district court to determine the extent to which Maurello's clients were dissatisfied with his services. "Loss", for purposes of U.S.S.G. § 2F1.1 would be calculated based only on instances where a consumer paid for something but did not get what he/she expected.

In Petitioner's view, his case and *Maurello* may not be a perfect fit but they are close. The fraud here was on the citizens of Philadelphia based on Petitioner's conflict of interest. But the trial evidence showed that although Petitioner had set Ricciardi up in the business and at first took an active role in referring clients and helping with her work, that gradually phased

out to the point where Ricciardi in a sense was on her own. Income during that later phase cannot be the measure of the "loss" without a particularized inquiry – which was not made by the district court – of the relationship between the proceeds and Petitioner's conflict of interest. Towards the end, the latter had little or nothing to do with the former.

The Court of Appeals distinguished Petitioner's case from its own cases in *Maurello* and *United States v. Hayes*, 242 F.3d 114 (3d Cir. 2001) because those cases involved interpretations of U.S.S.G. § 2F1.1 and not a specific interpretation of U.S.S.G. 2C1.7(b)(1)(A). The Third Circuit hung its analytical hat on the fact that U.S.S.G. § 2C1.7(b)(1)(A) provides for consideration of loss to the government or value of anything obtained by the public official or *others acing with a public official.* App. A at 52a-55a. The court went on to state that given the inclusion of the phrase "or others acting with the public official" justified calculating the loss in Petitioner's case by reference to the gross receipts Ricciardi earned through her expediting business.

These analytical gymnastics, however, ignore the essential nature of the fraud charges at issue in this case, specifically, that Petitioner breached his duty of loyal services by failing to disclose his financial interest in Ricciardi's business – the financial interest being defined by reference to his child support obligations. In this light, it seems that the approach applied and adopted by the courts below substantially overstates how the guidelines should be calculated in this case, and consequently, this Court in issuing a writ of certiorari should agree to review this question as well. Fundamental fairness so requires.

CONCLUSION

This case presents several questions of exceptional importance. First, this Court now has the opportunity to clarify and/or fine tune its holdings in *McCormick-Evans*. This Court can now – with consideration of heightened federalism concerns – clearly state exactly what is required in a color of right extortion case. The circuit court jurisprudence on this issue is "all over the map" and hence, for this reason alone, the writ should issue.

Additionally, for the reasons discussed above, this Court should take this opportunity to rectify the other inequities underlying Petitioner's conviction and sentence on the fraud counts.

Respectfully submitted,

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